

SINGAPORE REPORTS**THE ATTORNEY-GENERAL OF SINGAPORE v.
WONG WAI CHENG**[C.A. (Wee Chong Jin C.J., Kulasekaram & Rajah JJ.)
April 25, 1979]

[Singapore — Civil Appeal No. 54 of 1978]

Contract — Tender for public works — Breach — Claim for damages — Award by arbitrator — Decision based on principles of Suisse Atlantique case — "Fundamental breach" — Meaning of — Appeal allowed — Arbitrator erred in understanding of case.

Arbitration — Error in understanding case law — "Fundamental breach" — Failure of arbitrator to construe contract.

In this case, tenders were called for the construction and completion of four major road works across the island of Singapore. On July 10, the respondent contractor submitted a tender which was later revised for \$3,919,788 to complete the works within twenty four months "commencing from the date of possession of the site or within such extended time as by the Conditions of Contract provided". On October 28, 1970 the said tender was accepted by the Director of Public Works and subsequently a formal contract dated February 15, 1971 was signed, stating that date for possession was February 1, 1971 and January 31, 1973 as the date of completion.

Clause 32(b) of the Conditions of Contract provided "If the Contractor shall be...delayed from the execution or completion of the work by reason...of any such acts or omission of the Government...such...delay shall not vitiate the contract...." In such cases, compensation or allowance would be paid to the contractor as determined by the Government.

Subsequently, the contract sum was reduced to \$3,614,028.82 because part of the work was withdrawn.

On January 31, 1973, by mutual agreement the date for completion was extended by eleven months to December 31, 1973 because of delay due to land acquisition of burial grounds, squatter clearance and exhumation of affected graves. On June 5, 1973, the respondent rescinded the contract on the ground that the government was in fundamental breach thereof and stopped all work under the contract.

The dispute was referred to arbitration. The arbitrator held that the respondent had made out a case for fundamental breach based on the principle of the *Suisse Atlantique* case. The appellant appealed to the High Court by way of Motion to set aside the Award on the grounds, *inter alia*, that the Award was bad on its face or wrong in law. The High Court dismissed the Motion ([1979] 1 M.L.J. 59) and the appellants appealed.

Held, allowing the appeal: (1) the arbitrator erred in his understanding of the decision in the *Suisse Atlantique*: the question before the House of Lords in that case was not whether there had been a fundamental breach but whether, assuming there was a fundamental breach, a clause excluding or exempting liability was applicable;

(2) the failure of the arbitrator to construe the contract, in particular Clause 32(b) of the Conditions of Contract, and to consider all the facts and circumstances of the case, in particular the fact that the original completion date had been extended and it was within the contemplation of the parties that the time for completion was not of the essence of the contract amounted to an error of law apparent on the face of the award.

Case referred to:-

- (1) *Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361.

CIVIL APPEAL.

Warren Khoo (Senior State Counsel) for the appellant.

H.E. Cashin for the respondent.

Cur. Adv. Vult.

A Wee Chong Jin C.J. (delivering the judgment of the Court): In 1970 the Director of Public Works on behalf of Government called for tenders for work described as "The Construction and completion of:—

(i) Overpass at Adam Road/Pan Island Expressway Interchange, Singapore.

(ii) Underpass at Kheam Hock Road/Pan Island Expressway Interchange, Singapore.

(iii) Pan Island Expressway from Adam Road to Whitley Road, Singapore.

(Ch.1,100'0" to 0" at Adam Road to 5,134'0").

(iv) Carriageway linking Whitley Road to Mount Pleasant Road.

(Ch.0' to 1,300'0")."

C Madam Wong Wai Cheng, trading as Union Contractors, (hereinafter referred to as "the Contractor") was interested in tendering. Her representative was given a briefing of the works required, was shown round the site, and was informed that delays were anticipated over clearance of the site from all encumbrances or obstructions thereon. She submitted a tender dated July 10, 1970 in a Form of Tender provided by the Public Works Department and subsequently, after negotiations, revised her tender. Her revised tender was for \$3,919,788 to complete the works within twenty-four months "commencing from the date of possession of the site or within such extended time as by the Conditions of Contract provided." In her revised tender, the Contractor agreed "to execute and perform the works and provisions and supply all labour and materials... named, shown, described and alluded to in, or to be inferred from, the Form of Contract Agreement, Conditions of Contract, Specification, Schedule of Rates and Drawings for the Works above described, in conformity with the said Specification, Schedule of Rates and Drawings and under and subject to the said Conditions of Contract for the lump sum named...."

E Notes 5 and 8 of the Specification provided as follows:—

"5. The Contractor is to allow in his contract for any delay in his work that may occur due to presence of squatters, exhumation of affected graves (Seh Ong Burial Ground 620; Hokien Huay Kuan Burial Ground 1,361), and land not yet acquired on the date of possession of site. No claims or compensation of any kind shall be entertained with regard to such delays or inconvenience.

8. The diversion of existing services, if necessary, shall be undertaken by the (Public Works Department) or its agent, ..."

H The Director of Public Works by a letter of Acceptance of Tender dated October 28, 1970 accepted the revised tender specifying therein February 1, 1971 as the date for possession of the site. Subsequently a formal contract dated February 15, 1971 was signed. Clause 29(b) of the Conditions of Contract provided as follows:—

I "29(b). Possession of the site as complete as may be reasonably possible but not so as to constitute a tenancy, shall be given on or before the 'date for possession' stated on page 1 hereof to the Contractor who shall thereupon and forthwith commence the works and regularly proceed with and complete the same (except such painting or other decorative work as the Superintending Officer may instruct him to delay) on or before the 'date for completion' stated on page 1 hereof subject nevertheless to the provisions for extension of time hereinafter contained."

Page 1 of the contract named February 1, 1971 as the 'date for possession' and January 31, 1973 as the 'date of completion'.

Another relevant clause of the Conditions of Contract is Clause 32(b) which provided as follows: —

"32(b). If the Contractor shall be prevented from or be materially impeded or delayed in the execution or completion of the Work by reason or in consequence of any acts or omissions of the Government or of the Superintending Officer contrary to the true intent and meaning of these presents such prevention, impediment or delay shall not vitiate the contract or affect the same except that in such cases the question whether any or what compensation or allowance ought to be paid or made to the Contractor in respect of such prevention, impediment or delays and in what manner such compensation or allowance ought to be paid or made shall be determined and settled by the Government whose decision shall be final."

Subsequent to the signing of the formal contract, the contract sum was reduced to \$3,614,028.82 because part of the work was withdrawn. On January 31, 1973 (the original date for completion), by mutual agreement, the date for completion was extended by eleven months to December 31, 1973, it having been certified by the authorised officer of the Public Works Department supervising the execution of the contract and accepted by the Contractor, "that the contract work could not reasonably have been completed by (January 31, 1973) for delay due to:

- (a) Land Acquisition Lots 10-2, 10-7, 25-2 and 111-15 of Mk. XVII (Burial Grounds) approx. 29 acres. Lot 23-14 Mk. XVII — 14,765 sq. ft.
- (b) Squatter clearance (187 cases).
- (c) Exhumation of affected graves (approx. 2,383 graves)."

Four months later, on June 5, 1973, the Contractor rescinded the contract on the ground that the Government was in fundamental breach thereof and stopped all work under the contract. Thereafter, the Contractor refused to comply with a demand dated June 15, 1973 to resume work. The Public Works Department then called for tenders for completion of the work and a fresh contract was entered into with another contractor for the completion of the remaining work.

The dispute between the parties was referred to arbitration. Mr. Godwin, a practising advocate and solicitor was, by mutual agreement, appointed the sole arbitrator. In the arbitration proceedings the Contractor was the Claimant and the Attorney-General, the appellant in this appeal, was the respondent. Pleadings were filed and several amendments were made right up to the date of the arbitration hearing. After hearing the evidence and the submissions the arbitrator published his Award in which he incorporated the Pleadings, the Exhibits and his Notes of Evidence. It was a reasoned Award for his conclusion and finding that "the Claimant has made out a case for fundamental breach". The Attorney-General appealed to the High Court by way of Motion to set aside or remit the Award on the grounds, *inter alia*, that the Award was bad on its face or wrong in law. The High Court dismissed the Motion and the Attorney-General now appeals against the decision of the High Court.

It is necessary to examine the Pleadings to discover the issues which the arbitrator was asked to de-

A side. The Contractor in paragraph 10 of her Points of Claim alleged that on a true construction of the contract or as a matter to be implied by law the Government was obliged under the contract to do certain acts or things, namely: —

- (1) give possession of the whole of the site by such time as would permit of the works being completed by the original date for completion i.e. January 31, 1973;
- (2) give possession at one time of such stretches of the site as would permit an efficient and economic work plan to be carried out;
- (3) give possession of successive stretches of the site as would permit the Contractor's labour force and equipment to be used in such manner as not to cause loss to the Contractor;
- (4) give possession of such stretches of the site as would permit the proper forward planning for successive work according to a reasonable work schedule;
- (5) take reasonable steps and with reasonable despatch to locate and remove known graves on the site and to remove graves which might be discovered during the course of carrying out the works;
- (6) remove with reasonable despatch all squatters on the site;
- (7) remove with reasonable despatch the Government bungalows on the site;
- (8) remove or divert all drains and other services, the property of the Government, in time to prevent the work of the Contractor being held up, or at latest within a reasonable time of their being found;
- (9) take reasonable steps to ascertain the existence of all gas, water, electrical and telephone services on the site and to take steps to remove or divert all such services on the site in time to prevent the work of the Contractor being held up or at latest within a reasonable time of their being found.

G Paragraphs 11, 12, 13, 14 and 15 of the Points of Claim alleged that the Government were in breach of its obligations as alleged in paragraph 10 and paragraph 16 alleged that "by reason of the matters alleged in paragraphs 11, 12, 13, 14 and 15 the Contractor was able to do only part of the works and the doing thereof was delayed, interrupted and disrupted and the Contractor thereby suffered damage". Paragraph 16 also gave particulars of the special damage thereby suffered amounting to \$68,321.

I It is to be observed that the breaches of the contract alleged in paragraphs 10 to 15 of the Points of Claim fall broadly into two types, namely, (a) failure to give possession of the whole or part of the site and (b) failure to remove or delay in removing graves, squatters, buildings and public services from the site. Another observation is that in respect of these alleged breaches the Contractor was not alleging that they amounted to fundamental breach of the contract and was only claiming damages for these alleged breaches. The Attorney-General in his Points of Defence denied these allegations and raised the defence of waiver and estoppel in answer to the alleged failure to give posses-

sion of the whole of the site as would permit completion by the original date for completion.

Paragraph 17 of the Points of Claim alleged that the Government was in fundamental breach of the contract. It reads as follows:—

"17. On the 5th day of June 1973 the Contractor had still not been given possession of the whole of the site in that there were then still on the site 14 squatters and the 2 Government bungalows and the electrical cable at Adam Road underpass had still not been diverted and the Contractor says that the Government was in fundamental breach of the contract."

By paragraphs 15 and 17 of the Re-Amended Points of Defence and Counterclaim the Attorney-General joined issue with the Contractor on the allegation of fundamental breach. These two paragraphs read as follows:—

"15. Save that there were on the site 2 Government bungalows and one almost completely diverted electrical cable at Adam Road overpass on June 5, 1973, the (Government) denies paragraph 17 of the Points of Claim and denies that the (Government) was in fundamental breach....

17. Further, and in any event, and having particular reference to paragraphs 8, 9, 10, 11, 12, 13, 14, 15 and 16 hereof, the (Government) says that by virtue of clause 32(b) of the Conditions annexed to the Contract and on a true construction of the Contract, if the Contractor had been prevented from or had been materially impeded or delayed in the execution of the works by reason or in consequence of any acts or omissions of the Government or of the Superintending Officer contrary to the true intent and meaning of the Contract such prevention, impediment or delay should not vitiate or affect the same...."

The pleadings thus raised two broad issues for determination by the arbitrator. One was in respect of the alleged delay, interruption and disruption of the contract work thereby causing the Contractor to suffer loss by reason of the Government's breaches of contract as alleged in paragraphs 11, 12, 13, 14 and 15 of the Points of Claim. It was a disputed claim for damages for breaches of contract and no allegation was made that these alleged breaches of contract amounted to a fundamental breach of the contract. The other broad issue for determination was whether or not by reason of the matters alleged in paragraph 17 of the Points of Claim the Government was in fundamental breach of the contract so as to entitle the Contractor on June 5, 1973 to rescind the contract.

On this second broad issue, on the pleadings the question that fell to be decided by the arbitrator can be posed thus: It being admitted that there were still on the site on June 5, 1973, 14 squatters, 2 Government bungalows and an undiverted electrical cable so that possession of the whole of the site had still not been given by the Government on June 5, 1973, was the Government in fundamental breach of the contract on June 5, 1973? This is a mixed question of fact and law namely, was there, on the facts in evidence, a fundamental breach which entitled the Contractor to rescind the contract and sue for damages.

In his reasoned Award the arbitrator set out what he stated to be "the facts which to a large extent are not in dispute" and then continued as follows:—

"12. It has been argued on behalf of the claimant that the PWD is in fundamental breach of its obligations under the Contract as summarised in Hudson's Building and Engineering Contracts, 10th Edition, page 317, and authorities have been cited on both sides. The Claimant relies on the well-known case of *Suisse Atlantique Société d'Armement Maritime S.A.*

v. N.V. Rotterdamsche Kolen Centrale [1967] 1 A.C. 361 and other authorities.

13. The PWD in the course of copious amendments to its pleadings raised a large number of legal issues upon which verbal and written submissions were made. It is unnecessary to canvass the submissions on both sides at length. In my opinion, the obstructions and obstacles which the Claimant faced when trying to perform his Contract bring the case within the principle of the *Suisse Atlantique* case referred to above, by reason of the failure by the PWD to enable the claimant to proceed with the Contract Works in any normal commercial and foreseeable manner which rendered the performance or attempted performance of the Contract something totally different from that which the Contract contemplated, and it was legally relevant and justifiable for the claimant to consider what was going to happen in the future when he was consulting Bobby Ho and his sons shortly before giving notice that he treated the PWD as in breach. As stated above, the evidence of RW8 Robert Lim (one of the PWD's own witnesses) was to the effect that the first 11 months of the Contract were in effect lost, and that in May 1973, there was little difference between the situation which had existed in January 1973 and that 50-60% of the works, as things were in May 1973, still could not be done. The evidence of CW1 Peter Wee, and CW2 Bobby Ho, shows that the claimant reasonably feared bankruptcy if he were to attempt to continue with his Contract. The evidence of RW2 Kwok Chee Hong concerning the diversion of services is also indicative of a failure to plan ahead, to the claimant's detriment. I am accordingly of the opinion and so FIND that the claimant has made out a case of fundamental breach.

14. It is well established that a party who is in fundamental breach cannot rely on exceptions or protecting provisions in a contract, such as Clauses 29 and 32(b) of the Contract and the waiver at AB 2-204. I find that the contentions advanced on the PWD's behalf and based on wrongful abandonment by the claimant, fail, together with the pleas of waiver, affirmation and estoppel. Both waiver and election require some unequivocal act; estoppel requires some form of representation. (per Kerr J. *China National Oil Corp. v. Evlogia Shipping Co. S.A.* [1976] 3 All E.R. 865 at 814). I cannot find that these requirements have been satisfied in this case. I FIND that the circumstances which in fact were encountered by way of obstructions to the proper progress of the Works reasonably contemplated by the claimant were, or at any rate should have been anticipated or foreseeable on the part of the PWD, whose knowledge of the whole circumstances was, whilst considering the duration of the Contract, or should have been, far more detailed by reason of its access to information not available to tenderers e.g. as to diversion of services. I also find that there was no waiver of the fundamental breach or estoppel, or affirmation of the Contract, by reason of the claimant having struggled on as long as he could in the face of all the difficulties. The cases relied on by the PWD are distinguishable on the facts."

The question we have to decide in this appeal is whether there was any error of law on the face of the Award. At paragraph 13 of the Award the arbitrator stated that "in his opinion the obstructions and obstacles faced by the (Contractor) bring the case within the principle of the *Suisse Atlantique* case". He found that the Contractor had made out a case of fundamental breach "by reason of the failure by the P.W.D. to enable the (Contractor) to proceed with the Contract Works in any normal commercial and foreseeable manner which rendered the performance or attempted performance of the Contract something totally different from that which the Contract contemplated...."

It is clear from these passages that the arbitrator based his finding that the P.W.D. was in fundamental breach on a principle which according to him was established by the *Suisse Atlantique* case. It would appear from these passages, although the language is not entirely clear, that he understood this principle to

be that where the innocent party is unable, because of the default of the other party, to proceed in any normal commercial and foreseeable manner with his obligations under the contract so that the performance or "attempted" (meaning we think "further") performance of the contract would result in something totally different from that which the contract contemplated, then there is a fundamental breach.

So the first question for us must be whether the *Suisse Atlantique* case did establish the principle as understood by the arbitrator. The question before the House of Lords in that case was not whether there had been a fundamental breach but whether, assuming there was a fundamental breach, a clause excluding or exempting liability was applicable. Clearly, then, the arbitrator erred in his understanding of the decision in the *Suisse Atlantique* case.

Some of their Lordships, in their speeches, recognised that the phrase "fundamental breach" has in some of the decided cases been used interchangeably with the phrase "breach of a fundamental term" although in fact these two phrases have different meanings. Viscount Dilhorne, in this connection, said:—

"Although the terms are sometimes used as if their meaning was the same, a fundamental breach differs from a breach of a fundamental term. In *Smeaton Hanscomb v. Sassoon I. Setty, Son & Co. (No. 1)* ([1953] 1 W.L.R. 1468, 1470), Devlin J. said that he thought a fundamental term was 'something which underlies the whole contract so that, if it is not complied with, the performance becomes something totally different from that which the contract contemplates'. In relation to a fundamental breach, one has to have regard to the character of the breach and determine whether in consequence of it the performance of the contract becomes something totally different from that which the contract contemplates." (p. 393).

Lord Upjohn said:—

"There was much discussion during the argument upon the phrases 'fundamental breach' and 'breach of a fundamental term' and I think it is true that in some of the cases these terms have been used interchangeably; but in fact they are quite different. I believe that all of your Lordships are agreed and, indeed, it has not seriously been disputed before us that there is no magic in the words 'fundamental breach'; this expression is no more than a convenient shorthand expression for saying that a particular breach or breaches of contract by one party is or are such as to go to the root of the contract which entitles the other party to treat such breach or breaches as a repudiation of the whole contract. Whether such breach or breaches do constitute a fundamental breach depends on the construction of the contract and on all the facts and circumstances of the case. The innocent party may accept that breach or those breaches as a repudiation and treat the whole contract at an end and sue for damages generally or he may at his option prefer to affirm the contract and treat it as continuing on foot in which case he can sue only for damages for breach or breaches of the particular stipulation or stipulations in the contract which has or have been broken.

But the expression 'fundamental term' has a different meaning. A fundamental term of a contract is a stipulation which the parties have agreed either expressly or by necessary implication or which the general law regards as a condition which goes to the root of the contract so that any breach of that term may at once and without further reference to the facts and circumstances be regarded by the innocent party as a fundamental breach and thus is conferred on him the alternative remedies at his option that I have just mentioned. I discussed this matter in the Court of Appeal in *Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.* ([1962] 2 Q.B. 26, 63; [1962] 2 W.L.R. 474; [1962] 1 All E.R. 478, C.A.)" (at pages 421-422).

Lord Reid did not advert to this distinction and decided the issue before the House of Lords on the

A assumption that the fundamental breach the House of Lords was asked to assume meant a breach by one party "which entitles the innocent party to treat it as repudiatory and to rescind the contract" and not a breach of a fundamental term of a contract.

To decide whether or not there has been a "fundamental breach" as distinct from a breach of a "fundamental term" Viscount Dilhorne said that "one has to have regard to the character of the breach and determine whether in consequence of it the performance of the contract becomes something totally different from that which the contract contemplates". Lord Reid said that "one way to look at the matter would be to ask whether the party in breach has by his breach produced a situation fundamentally different from anything which the parties could as reasonable men have contemplated when the contract was made. Then one would have to ask not only what had already happened but also what was likely to happen in future. And there the fact that the breach was deliberate might be of great importance". Lord Upjohn said that "whether such breach or breaches do constitute a fundamental breach depends on the construction of the contract and on all the facts and circumstances of the case." Lord Hodson said that "often expressions have been used in various cases such as fundamental breach or breaches going to the root of the contract to describe those situations created through the fault of one party which have a frustrating effect and make the contract in its original form at any rate impossible of performance". (page 421). Lord Wilberforce said that "these expressions ('fundamental breach' or a breach going 'to the root of the contract') are used in the cases to denote two quite different things, namely, (i) a performance totally different from that which the contract contemplates, (ii) a breach of contract more serious than one which would entitle the other party merely to damages and which (at least) would entitle him to refuse performance or further performance under the contract". In these extracts, which are clearly *obiter*, their Lordships were not deciding anything and were not laying down any principle of law. In effect what they were saying is that the question whether one party has committed a "fundamental breach" is a mixed question of fact and law.

Next, we have to consider whether the arbitrator on the face of the Award correctly applied the views expressed in the *Suisse Atlantique* case as to what breach of contract would constitute a fundamental breach. It is to be observed that in paragraphs 12 and 13 of the Award he did not refer to Clause 32(b) of the Conditions of Contract. In our opinion, looking at the language of these two paragraphs, it is clear that he failed to consider Clause 32(b) in arriving at the conclusion that the obstructions and obstacles on the site as at June 5, 1973 would render the further performance by the Contractor under the contract something totally different from that which the contract contemplated.

It is apparent from a reading of Clause 32(b) that the parties clearly contemplated, when the contract was made, that there would be impediment and delays to the execution or completion of the contract work due to acts or omissions on the part of the Government and

expressly provided in that clause for the consequence of "such prevention, impediment or delay". The clause expressly provided that such default on the part of the Government should not vitiate the contract. If that clause had been considered by the arbitrator in relation to the question of fundamental breach it would, in our judgment, have been impossible for him, had he understood the "principle of the *Suisse Atlantique* case", to arrive at the conclusion that the continued performance by the Contractor under the contract was rendered impossible or would result in something totally different from that which the contract contemplated, or that the impediments on the site as at June 5, 1973 and the consequent inability to complete the contract works within the extended completion date had created a situation fundamentally different from anything which the parties could as reasonable men have contemplated when the contract was made, or which had a frustrating effect and made the contract impossible of performance.

In our judgment the failure of the arbitrator to construe the contract, in particular Clause 32(b) of the Conditions of Contract, and to consider all the facts and circumstances of the case, in particular the fact that the original completion date had been extended and it was within the contemplation of the parties that the time for completion was not of the essence of the contract amount to an error of law apparent on the face of the Award. It is therefore unnecessary for us to consider whether, if in fact the Government was in fundamental breach, the Government could rely on the excepting and protecting provisions in the contract.

Accordingly, the appeal must be allowed with costs here and in the court below and the Award set aside. As counsel for the Attorney-General has intimated that the Government does not intend to proceed with the counterclaim we do not consider this a proper case for the matter to be remitted back to the arbitrator.

Appeal allowed; Award set aside.

Solicitors: *Murphy & Dunbar.*

**PATRIOT PTE. LTD. v.
LAM HONG COMMERCIAL CO.**

[C.A. (Wee Chong Jin C.J., Kulasekaram & D'Cotta JJ.)
August 16, 1979]

[Singapore — Civil Appeal No. 64 of 1978]

Contract — Illegal contract — Claim for breach of — False declaration to evade Indonesian customs duties — No assistance by court.

The appellants in this case claimed against the respondents for the purchase price of 4,000 sets of rubber tyres purchased by an Indonesian from a Taiwan seller. The said goods were shipped on a ship proceeding from Taiwan via Singapore to Jakarta, Indonesia. The facts revealed that the appellants opened a Letter of Credit in favour of the Taiwan seller for the agreed purchase price, US\$228,305 through their bankers in Singapore. The bills of lading and other supporting invoices and documents covering shipment of the goods were sent to the appellants' Singapore bank by the Taiwan seller. The Indonesian buyer opened a Letter of Credit through a Singapore bank in favour of the appellants, for US\$47,000 a much lesser sum than the agreed purchase price. This sum was declared on the "Proforma

A Invoice" which was supplied by the Indonesian Embassy in Singapore.

The respondents obtained a blank "Proforma Invoice" from the Indonesian Embassy. The appellants signed this blank document and the respondents subsequently filled in all the requisite particulars, most of which were false to avoid payment of customs duties on the imported goods. The arrangement between the respondents and the appellants were contained in three letters from the respondents to the appellants.

B When the ship arrived at Jakarta, they were refused entry as they did not tally with the description in the "Proforma Invoice" as endorsed by the Indonesian Embassy in Singapore. The goods were sent back to Singapore and eventually were sent to another Indonesian port. The respondents failed to pay the appellants.

C The court below held that the "whole operation was designed expressly by the parties herein and the Indonesian buyer to evade Indonesian Customs duties" and dismissed the appellants' claim on the ground that the contract between the parties was illegal and void. On appeal to the Court of Appeal,

D **Held**, dismissing the appeal: if a party to a contract actively engages in an illegal adventure to get goods into a country in breach of the revenue laws of that country, the court will not assist the parties to the adventure by entertaining or settling any dispute between the parties arising out of the contract.

Cases referred to:-

- (1) *Fielding & Platt Ltd. v. Najjar* [1969] 1 W.L.R. 357.
- (2) *Foster v. Driscoll* [1929] 2 K.B. 470.

HIGH COURT.

E *James Wan Hui Hong* for the plaintiffs.
Phua Cheng Kan for the defendants.

Cur. Adv. Vult.

F **Rajah J.:** On all the evidence before me it seems fairly clear that as from sometime in May or June 1974 the plaintiff company and the defendant company in conjunction with some Indonesian buyers in Indonesia were engaged in a conspiracy to defraud the Indonesian Government of its lawful customs dues.

G Rubber tyres would be shipped by a seller in Taiwan to a buyer in Jakarta via Singapore. This would be notified to the plaintiff company in Singapore. A bill of lading (with the indorsement "B/L to be switch (*sic*) in Singapore") would be drawn up to this effect together with a supporting Invoice, Packing List and Certificate of Origin. To bring about this shipment of tyres the plaintiff company would open a letter of credit for the full purchase price (in the instant case for US\$228,305) through its bankers in Singapore. The documents covering the shipment would then be sent to the Singapore bank by the Taiwan seller. In the meantime the Jakarta buyer would have sent to the Singapore bank a Letter of Credit (in the instant case dated January 17, 1975 — Exhibit 5AB12) in favour of the plaintiff company for a very much lesser sum (in the instant case for US\$67,000 later reduced on March 18, 1975 by US\$20,000 — Exhibit 5AB14). **H** On receipt of the shipping documents by the Singapore bank it would turn over the documents to the plaintiff company the latter on having executed a trust receipt in favour of the former. A Proforma Invoice, on a form supplied by the Indonesian Consulate, would then be prepared by the defendant company setting out the quantity of tyres and the unit price and the total value of the goods which would be very much